

Chinese (Anti-)Constitutionalism

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Many (*Verfassungs*-)blog posts on [China](#), be it on [tweets](#), [white papers](#), or the [Social Credit System](#), criticize legal institutions and realities by highlighting their difference from “Western” or constitutionalist (#####) traditions. This makes it rather easy for the [explicitly anti-Western and anti-constitutionalist](#) official Chinese system of thought, Sino-Marxism, to reject any criticism – either as [Eurocentric](#), ([legal](#)) [Orientalist](#), and “[culturally hegemonic](#)” or as ignorant of “[theoretical basis](#)” of the Chinese system. Therefore, legal scholars should always be aware of [the two fundamental differences](#), which Sino-Marxism is both a product of and again produces: the one on the “deep level”, of ideologies underlying the law, and on the “meta level”, of methods employed to analyze and compare the law. Knowing Sino-Marxism, which provides powerful political but only limited analytical tools, is thus crucial for [transnational](#) and [global constitutionalists](#) in order to defend their values without being accused of a lack of understanding – also in the current case of [Hong Kong](#).

Sino-Marxism (##(#)#####) and Xi Jinping Thought

[Sino-Marxism](#) is officially described as the “sinicized and modernized” version of Marxism or “Marxism with Chinese characteristics”. In this (significantly) modified form, Marxism is still authoritative for both Chinese state organs and the CCP – that is, legislators, judges, public administrators, armed forces, state-owned enterprises etc. as well as all party members. They “must take Marxism as their guide to action”, because “[its basic tenets are correct and have tremendous vitality](#)”. Also, China’s population and academia (scholars being always part of the population, often employed in state institutions, and not seldom party members) are required to adhere to this “guiding ideology”, as “[it has been perfectly right for history and the people to choose Marxism](#)”. Therefore, Sino-Marxism is not limited to [Marxist jurisprudence \(#####\)](#) and [Marxist comparative law with Chinese characteristics \(#####\)](#). Rather, it yields far-reaching implications for both Chinese positive law and legal studies, be it inner-state or comparative.

Despite claiming to be anti-constitutionalist – and thus perhaps better described as [authoritarian constitutionalism](#) –, Sino-Marxism has canonized its “leading maxims” and major principles both in the [People’s Republic of China \(“PRC”\) Constitution](#) and the [Chinese Communist Party’s \(“CCP”\) Statute](#). The enumerated maxims are Marxism-Leninism (#####), Mao Zedong Thought (#####), Deng Xiaoping Theory (#####), the “Important Thought of Three Represents” (“#####”), and the “Scientific Outlook on Development” (#####).

Latest in the row is [Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era \(#####\)](#), included in the CCP Statute in 2017 and the PRC Constitution in 2018. The increasingly aggressive regulations under Xi are described with the most harmonious topoi: [twelve “socialist core values”](#), a

[“four-pronged comprehensive strategy”](#) and [one “China Dream”, leading to the “great rejuvenation of the Chinese nation”](#). It may be debated to which extent this constitutes a [continuance of current ideology and praxis](#), a [return to former, especially Maoist, principles](#) or a [qualitatively “new era” featuring a “new normality”](#), as stated in the official discourse. Yet, it is undisputed that current developments [cannot be grasped by taking these topoi at face value](#), but rather by identifying Sino-Marxism’s four basic implications that also Xi Jinping Thought (and deed) rely on:

Law and practice (##)

First, Sino-Marxism conceptualizes [law and theory as subordinate to practice](#). [Making law](#), as [any other activity of the state or the party](#), must “seek truth from facts” (####) and act according to “practical necessities”. These claims refer to [base-superstructure-theory](#), the core element of [\(historical\) materialism](#). As part of the superstructure, positive law is “dependent upon” the practical base – as are [legal studies](#).

Therefore, such [legal pragmatism](#) can also be found in methodology: Inner-state jurisprudence employs [analytical techniques](#) like “theory building and testing according to practice”, and comparative law “transfers foreign experiences” in order to generate legal reforms.

Law and actuality (## or ##)

Secondly, this practice that law must abide by is [the “actual” one](#). [Actuality has a factual and temporal dimension](#), designating the “reality” at a certain time. It thus combines the base-superstructure model with dialectics to [dialectical materialism emphasizing the dynamics and contradictions between base and superstructure](#). Its so-called “sinicized” version is [Mao Zedong’s theory of contradictions \(####\)](#) aiming to identify the primary and secondary, internal and external contradictions in society – and to solve them.

Methodologically, legal analyses (or: comparisons) therefore start from the contradictions and current “reality” in Chinese society (or: the societies compared) and explain Chinese law (or: compare the respective legal orders) on that basis. This reveals interesting similarities to, and might be [additionally explained with, American-inspired legal realism, since many conservative – in China: “leftist” – legal scholars have been educated in the United States](#). For Sino-Marxists, the practical base thus serves as the analytical basis of legal studies, and not merely as their [additionally considered legal “context”](#).

Actuality is praised for giving rise to significant ideological flexibility, because contradictions and practical necessities (may) constantly change. However, actuality as a “general clause” is devoid of content and [exclusively defined and changed by the CCP](#): Therefore, in 1978/81, party leaders could, with a wave of the hand, declare “economic backwardness” as the most pressing contradiction and economic development as the highest goal of Chinese politics and law. The economic

instrument created in the reform and opening-up era (####) are thus [regarded as a “socialist market economy” and, *prima vista* paradoxical, as a consequence of Marxism](#).

Example: Actuality and contradictions in current Hong Kong

The theory of contradictions is also revealing in the current case of Hong Kong. Having “returned” (####) in 1997, Hong Kong as a “special administrative region” (HKSAR) forms part of the PRC territory. This [territorial integrity will, at \(almost\) any price, be upheld as China’s “core interest” \(####\)](#). For this purpose, however, Sino-Marxism considers it necessary to solve alleged contradictions around Hong Kong:

First, the internal contradictions in Hong Kong society are [supposedly rooted in British colonial rule](#). Sino-Marxism identifies primary contradictions between [“labour and capital”](#) and between [“the rise in demands of the urban population and the decline in governance abilities of the HKSAR government”](#), or secondary contradictions in terms of [housing](#) etc. Then, the external contradictions between Hong Kong, [especially its courts](#) (seen as a [British heritage](#)), and the [central level](#) in Beijing. Both the mode of definition of contradictions and their qualification as internal or external might be [questioned from an intra-Marxist perspective](#). However, they have led Sino-Marxists to argue that “one country, two systems” (####) could never be a [long-term solution](#) – but rather a [contradiction to be solved](#). Moreover, Sino-Marxists consider Hong Kong as part of the main contradiction of the whole Chinese society, [redefined under Xi Jinping in 2017](#) as the PRC’s inter-locally “unbalanced and inadequate development”. This explains why state and party leaders [are not any more interested in maintaining Hong Kong’s “unbalanced”, outstanding status towards the Mainland – be it as a hub for finance](#) and business or for (respective) personal freedoms and self-administration.

These “theoretical fundaments” suggest that Chinese state and party leaders might concede single points to Hong Kong protesters, e.g. by [withdrawing the extradition bill](#) or by [not cancelling district elections](#), but will hardly give in to their final aims. This is because the latter, though [probably equally suitable to solve alleged contradictions surrounding Hong Kong](#), point in a direction opposite to the “eschatology” outlined in the CCP statute and PRC constitution.

Law and politics (##)

Another reason for this prognosis is, thirdly, Sino-Marxism’s [integrated “politics and law” concept \(##\)](#). Politics is used synonymous with the [political rule by the CCP](#), claiming that there can only exist one ruling party (###). And because of the principle (*de constitutione lata*) that this party shall lead the people, state, and legislation (### #), politics is considered superior to law and legal studies.

Methodologically, this is supported by [political legal studies \(#####\)](#), [politico-legal legal studies \(#####\)](#), and [political constitutional studies \(#####\)](#) developed by [Chen Duanhong](#). The latter, although translated as [political constitutionalism](#), in an again anti-constitutionalist manner only treats contents set by the CCP as the [substantial and “real” constitution of the PRC](#) – be it the CPC statute, other political documents (#####) and party norms (##### or #####), or the principle of party leadership itself.

Anti-normative normativity (###)

Fourthly and as a consequence, Sino-Marxists – as many others – openly reject [formalism, idealism, and liberal legalism](#). But they still claim to adopt a kind of normativism – which they, however, demand to [“emanate from political realism”](#), [“repel abstract and void idealism”](#), and [“be born out of political power”](#). As a result, Sino-Marxist normativity does not describe the [specific existence of law in the sphere of “ought”, \(analytically\) separated from the world of “is”, let alone the “intrinsic value” and “immanent force”](#) of the law. Rather, it cumulates in a factualistic positivism of power that is challenged by various “schools” of (legal) studies, but for different reasons:

Liberal scholars [in China](#) and [the West](#) contest its foundation – rejecting the autonomy of law and legal studies – by defending normativistic legal positivism and (liberal) constitutionalism. Critical scholars question its justification – supposed “Chinese characteristics” (#####) – as [sinocentric, self-Orientalist, and essentialist](#) (inverting the Sino-Marxist allegations against “Western” or constitutionalist scholarship). And Marxist scholars object its conclusions – subordinating law and science to practice, actuality, politics, and anti-normative normativity – from an “internal” standpoint: Firstly, because these conclusions are not only [“far from orthodox Marxist dogmatism”](#), but also from [radical democratic readings of Marx and Engels](#). Secondly, because they ignore [the differences between base and superstructure, the distinctions inside superstructure](#), and [the dialectics between them](#).

In a nutshell: Sino-Marxism might provide Chinese state and party leaders with powerful political tools. Their analytical strength, in contrast, is rather limited. Therefore, legal scholars should elucidate instead of simply elide, but, at the same time, deconstruct instead of simply replicate Sino-Marxism – as is the case with [all other ideologies \(#####\)](#).

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